

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re:

Case No.: 94-14374

Ralph J. Valenti (Deceased)  
and Mary Phyllis A. Valenti

Chapter 7

Debtor(s)

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APPEARANCES:

DeLorenzo, Pasquariello, Weiskopf, P.C.  
Attorneys for the Debtor(s)  
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Schenectady, New York 12307

Richard H. Weiskopf, Esq.  
Of Counsel

Lemery, MacKrell, Greisler, LLC.  
Attorneys for the Chapter 7 Trustee  
80 State Street  
Albany, New York 12207

Paul A. Levine, Esq.  
Chapter 7 Trustee

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

**Memorandum-Decision & Order**

Before the court is a motion by the Chapter 7 Trustee ("Trustee") requesting an order compelling Mary Valenti ("Debtor") to turnover certain BellSouth stock.

**Jurisdiction**

The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A), (B), (E) and (O) and 1334(b).

**Facts**

The undisputed facts are:

1. On December 1, 1994, the Debtor and her husband filed a Chapter 13 petition.
2. Schedule "B" listed 267 shares of New York Telephone (a/k/a Baby Bell) stock. They listed the value as unknown and also claimed an exemption in this stock.
3. On February 3, 1995, the Chapter 13 Trustee<sup>1</sup> objected to confirmation of the plan, contending that the exemption was inappropriate and that without a

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<sup>1</sup>The judge currently presiding in this court was the Chapter 13 Trustee that made this objection. Both parties have agreed, in writing, that this court should hear and determine this matter. Based upon that consent and the court's ability to determine the matter impartially, the court will refrain from recusal.

valuation of the stock it would be impossible to determine if the plan met the requirements of 11 U.S.C. § 1325 (a)(4).

4. On March 15, 1995, the Debtor and her husband amended their schedules and plan indicating that the stock was worth \$11,000.00 and that since they intended to retain the stock, the unsecured creditors would necessarily be paid 100%.
5. The Debtor and her husband remained in Chapter 13 until the death of Mr. Valenti. The case was then voluntarily converted to Chapter 7 on December 9, 1999. During the pendency of the Chapter 13, they paid \$38,636.00 into the plan. A majority of this money was applied to the secured debts including the mortgage arrearage.
6. After the conversion, Paul Levine, Esq., was appointed Chapter 7 Trustee.
7. On February 17, 2000, the Trustee moved to compel the Debtor to turnover the stock.
8. The Debtor filed timely opposition.

### **Arguments**

The Trustee argues that 11 U.S.C. § 348(f)(1)(A) clearly establishes that the stock is property of the Chapter 7 estate, and therefore, the Debtor must turnover this property for liquidation.

The Debtor argues that she paid the value of the stock during the pendency of the Chapter 13 case by tendering approximately \$39,000.00 to the Chapter 13 Trustee. She concedes that there remains approximately \$5,000 due to unsecured creditors pursuant to the Chapter 13 plan and order, but she contends that if she is required to relinquish the stock, she would be paying for it more than once.

### **Discussion**

11 U.S.C. § 348(f)(1)(A) states:

Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter of this title –

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion...

The plain language of this statute dictates that the stock in the possession of the Debtor is property of the estate that must be turned over to the Trustee. The court empathizes with the Debtor, however, the statute is clear. The Debtor's argument that she paid the value of the stock during the pendency of the Chapter 13 case, while understandable, is misguided. Furthermore, her contention that § 348(f)(1)(A) is inapplicable in this matter is not supported by any statutory authority or case law.

The case relied upon by the Debtor, *In re Wegner*, 243 B.R. 731 (Bankr. D. Neb. 2000), is factually distinct and inapplicable. In *Wegner*, the court determined that the appreciation on a debtor's home during the pendency of the Chapter 13 case was not property of the converted Chapter 7 estate. However, as correctly pointed out by the Trustee, a critical factor in the determination in that case was the fact that the home was subject to a homestead exemption. In the present case, the controversy does not pertain to an increased value in an exempt asset, rather, the issue concerns a non-exempt asset.

The Debtor also makes an argument regarding the statutory construction of § 348. The court finds that argument unpersuasive.

For this Debtor to have had her Chapter 13 plan confirmed she would have had to have met the requirements of 11 U.S.C. § 1325. Subsection (a)(4) states,

Except as provided in subsection (b), the court shall confirm a plan if – the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

This liquidation analysis determines how the unsecured creditors would have been treated had the petition been filed under Chapter 7. If the present case had been filed under Chapter 7, the secured creditors would have looked to their collateral to satisfy their debt; the unsecured creditors would have looked to the net proceeds from the liquidation of the stock for payment of their debt. The Chapter 13 confirmation order encompasses this analysis indicating that to retain this stock the Debtor needed to pay the unsecured creditors 100% of the monies they were due. That simply was not done.

It is true that the Debtor funded \$36,338.39 into the Chapter 13 plan. However, the dollar amount paid to the Chapter 13 Trustee is not the key to retaining this stock. Rather, what is crucial is that the unsecured creditors receive the total amount due to them pursuant to the § 1325(a)(4) analysis. The final report and accounting provided by the Chapter 13 Trustee indicates that unsecured creditors received \$5,781.95 of the \$36,338.39. Thus, the balance due to the unsecured creditors pursuant to the liquidation analysis is at least \$4,859.01.<sup>2</sup> Thus, to retain this non-exempt asset

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<sup>2</sup>Claims filed in the Chapter 13 are considered filed in the Chapter 7. *See* Fed. R. Bankr. P. 1019(3). Additionally, converting to Chapter 7 established a new claims bar date. *See* Fed. R. Bankr. P. 1019(2).

the Debtor must pay the monies due to the unsecured creditors in the Chapter 13 case pursuant to the liquidation analysis, together with any claim filed in the Chapter 7 and any costs of administration of this estate.

The Trustee's request that the Debtor turnover all the stock would be overkill. The Trustee should receive only the stock necessary for the complete payment of all unsecured claims, including any Chapter 7 claims and the costs of administration of this estate.

### **Conclusion**

For the above reasons, the Trustee's request for turnover is granted to the extent he receives stock in the amount indicated above.

It is so ORDERED.

Dated:  
Albany, New York

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Hon. Robert E. Littlefield, Jr.  
United States Bankruptcy Judge